INDEX.

DECISIONS HERETOFORE IN THE CASE

District Court and Court of Appeals Decisions

Supreme Court Decision

Supreme Court of California Decisions in Analagous Cases

Land Department Refuses to Follow Rulings in Matters of Law Made by Federal Courts in Decisions which are Affirmed by the Supreme Court of the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 495.

PATRICK H. BODKIN,
Appellant and Petitioner,
v.
WILLIAM B. EDWARDS.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SECOND PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

An attorney hazards a rebuke or more serious disciplining by this court, only when he has grossly disserved his client here or has abused the privileges accorded under his admission to practice here. He does neither when he repeats an effort to serve well both this court and his client. Hence the filing of this *sec-*

ond petition for rehearing, without the slightest doubt that the attitude of this court toward counsel will be one of approbation rather than reprobation, after due consideration of its contents.

DESCRIPTION OF CASE.

Law or Fact?

No. 495 in this court is a case wherein Edwards, the appellee, filed below a complaint praying that Bodkin, the appellant, be decreed to be a trustee, for Edwards, of the legal title that passed to Bodkin under a patent which the United States issued to him for certain lands in Riverside County, California.

Do cases of this character ordinarily turn on questions of fact exclusively? Do they not almost invariably turn on questions of law exclusively? No. 495 PRESENTS QUESTIONS OF LAW WHICH HAVE NEVER BEFORE BEEN PRESENTED IN THE SUPREME COURT OF THE UNITED STATES.

As shown hereinafter, the *original* complaint was dismissed by the District Court, 241 Fed., 931, but was thereafter, and on appeal, sustained as a sufficient pleading by the Court of Appeals, *but sufficient only under the view taken by that Court of the meaning of an act of Congress which it said the land department had "mistaken" or "overlooked," for about fifteen years, and under its view that certain regulations of the Department of the Interior, which had obtained for fifteen years, plainly contravened the law, 249 Fed., 562.* After the case went back to the District Court, Edwards filed an *amended* bill.

The *amended* bill of complaint alleged that on July 17, 1902, the land in suit was included in a "second

form" withdrawal under the Reclamation Act, 32 Stat., 388, which withdrew it from entry, *except under the homestead laws* (Rec., 3); that thereafter, and on December 1, 1902, Edwards made a homestead entry of the land (Rec., 1); that subsequently (September 12, 1903), the withdrawal was changed from a "second form" to a "first form" withdrawal, the latter "form" being of "that class that precluded the further initiation of new rights of any kind or character" (Rec., 4); that by operation of law "all contest rights and privileges pertaining to the homestead law were cut off" by such "first form" withdrawal (Rec., 4); that, nevertheless, the land department prescribed regulations, in 1905, allowing contests to be initiated against entries of lands in "first form" withdrawals (Rec., 6); that Bodkin (on January 30, 1908) was permitted to file a contest against Edwards' entry upon the charge "that plaintiff (Edwards) had never established a residence, or made any improvements, and that he had abandoned the land for more than six months" (Rec., 5); that the contest affidavit of Bodkin was not executed by him on personal knowledge of the truth of its charges, but upon information and belief (Rec., 5); that the contest had abated by force of certain other regulations of the land department, which were promulgated in 1909 (Rec., 5); that on the evidence adduced in the contest proceeding, the land department (on April 19, 1910) cancelled Edwards' entry (Rec., 5 and 6); that the first form withdrawal was terminated and the land was restored to settlement and entry on April 18, 1910, and May 18, 1910, respectively, and that on the first stated date Edwards was in occupancy of the land and claiming it as a homestead settler (Rec., 6); that thereafter, and des-

spite an attempt by Edwards to make a homestead entry of the land, the Department of the Interior permitted a homestead entry thereof by Bodkin upon the ground that he had acquired a preference right of entry because of his successful contest against Edwards' homestead entry (Rec., 6); that thereafter the land department rejected an application by Edwards to contest Bodkin's homestead entry (Rec., 8); that Bodkin afterwards relinquished his homestead entry and appropriated the land under "scrip applications," and that a protest by Edwards against such applications was destroyed by some "incumbent of the land office" (Rec., 9); that patents issued to Bodkin under the "scrip" application in disregard of the rights of Edwards.

The *amended* complaint alleged that all the judgments and acts of the land department officials and of other officers of the government adverse to Edwards' claim to the land in suit were due to Bodkin's "friendly relations with certain land department officials" (Rec., 5); to a desire by the land department officials "to make good the assurances given to defendant (Bodkin) and in aid of his speculative program" (Rec., 5), to "field agents of the department" • • • "making wrong reports concerning plaintiff" (Rec., 5), to "private and confidential letters" from Bodkin and his attorneys "to the individual examiners in charge of the cases" (Rec., 9), to "bias and prejudice culminating in a conspiracy" (Rec., 10), to the alleged fact that the land department "was so seized with its own animosity, and so burdened with the animosity of others as to be incapable of rendering a just judgment" (Rec., 10), to "ignoring and mistaking the law and proceeding through a partisan bias and prejudice" (Rec., 2),

to intimidation of a State Court by a United States Attorney (Rec., 7), and to the alleged fact that "the Assistant Attorney General from Washington, D. C.," used "manufactured evidence" against Edwards (Rec., 8).

AT NO PLACE IN THE *AMENDED* COMPLAINT WAS IT EXPRESSLY OR OTHERWISE ALLEGED THAT THE LAND DEPARTMENT'S FINDINGS OF FACT IN PROCEEDINGS HAD BEFORE IT WERE WITHOUT ANY EVIDENCE, OR SUBSTANTIAL EVIDENCE, TO SUPPORT THEM.

In closing the amended complaint, Edwards summarized and fittingly described his case in these words:

> *"Plaintiff alleges that if these MISTAKES OF LAW and this bias and prejudice here shown, and the voluntary and involuntary fraud to which plaintiff has been subjected, had not been the CONTROLLING FACTORS IN THE CASE, patent would have issued to plaintiff, and not to defendant"* (Rec. 10). (Italics supplied.)

The answer to the *amended* complaint was a painstakingly prepared pleading, extending from page 11 to page 29 of the record, that cast upon Edwards the burden of proof of every one of his serious charges of malfeasance and misfeasance on the part of officers of the United States Government, and required of him due proof that corruption or bias and prejudice produced the findings of fact and rulings in law which the land department had made in its several decisions.

ONLY UPON THE THEORY THAT THE LAND DEPARTMENT WAS CORRUPT OR CRIMINALLY BIASED CAN THE CASE BE REGARDED AS ONE OF FACT AND NOT OF LAW. HAS THE SUPREME COURT OF THE UNITED STATES FOUND THAT THE SAID DEPARTMENT WAS CORRUPT OR BIASED?

Edwards was explicit in the statement of his case. He alleged that he had been wronged (1st) because the land department had made "mistakes of law," (2d) because there was "bias and prejudice" against him in the land department and in the Department of Justice, and (3d) owing to the "voluntary and involuntary fraud to which plaintiff has been subjected." *He asserted that the said mistakes, the said bias, and the said fraud were the "controlling factors in the case."*

WHAT WE SEEK TO DISCOVER BY THIS PETITION FOR RE-HEARING IS THE PARTICULAR ONE OF SUCH "CONTROLLING FACTORS" THAT CONTROLLED THE DECISION WHICH THE SUPREME COURT OF THE UNITED STATES RENDERED ON FEBRUARY 28, 1921. ITS SAID DECISION WAS THAT "THE CASE AS PRESENTED HERE TURNS ESSENTIALLY ON QUESTIONS OF FACT." WHAT WERE THOSE FACTS, AND WERE THEY FACTS IN PROOF ESTABLISHING BIAS OR FRAUD ON THE PART OF THE LAND DEPARTMENT? WE DO NOT KNOW, NOR CAN ANYONE KNOW FROM ANYTHING SET OUT IN THE SUPREME COURT'S SAID DECISION OF FEBRUARY 28, 1921, THE PRECISE FACTS WHICH THAT COURT HAD IN MIND. ALL THE LIGHT THAT

SAID DECISION AFFORDS AS TO WHAT CONTROLLED THE CONCLUSION OF THE SUPREME COURT IS CONTAINED IN THE OBSERVATION THEREIN "THAT IN THE PROCEEDINGS BEFORE THE LAND DEPARTMENT MATTERS PRESENTED BY EDWARDS WHICH SHOULD HAVE BEEN CONSIDERED WERE NOT CONSIDERED." WHAT WERE THOSE MATTERS, AND WERE THEY MATTERS OF LAW OR MATTERS OF FACT?

None of the courts below found any fact which was adjudged to be proof of bias in the land department or of fraud in that department operating upon Edwards. It is so plain as to be obtrusively evident, that the decisions below followed and applied the astonishing announcement of the Court of Appeals, 249 Fed., 562, that the land department had "mistaken" or "overlooked" a statute relating to the public domain, to the damage of Edwards, and that it had enforced against Edwards certain regulations that contravened the law.

If the *amended* complaint which was filed by Edwards is subjected to a closer scrutiny by the Supreme Court of the United States than has been given to it heretofore, it will become apparent to said court that Edwards did not allege that the land department had refused or failed to consider matters which he had presented to it and which it was the duty of said department to consider. *Further examination of that pleading will show only this, viz., allegations to the effect that the matters which Edwards did present to the land department were not considered by it with results to the liking of Edwards.*

If the record in No. 495 is more carefully examined

by the Supreme Court of the United States than it was examined heretofore, said court can not fail to discover therein the proof that all and everything Edwards alleged he had presented to the land department, was not only considered by said department, but was painstakingly and exhaustively considered by it. (R., 30 to 64; 71 to 73.)

If this case is again and more minutely inquired into by the Supreme Court of the United States it will be perceived by said court that Edwards did not allege that the land department had refused or failed to consider matters presented to it on his behalf, *but that what he alleged was that such matters as he had presented were considered by officers of said department who had been debauched, seduced and corrupted by Bodkin.*

If the Supreme Court of the United States will but again, and with more sedulousness, review the record in No. 495, it will not fail to apprehend that the man who did not hesitate to hurl the foulest of charges against many officers of the government, viz., that such officers ignored and disregarded the rights of one citizen in order to patent public lands of the United States to another, made not the slightest attempt to adduce any evidence in support of his accusations of criminal conduct in public office.

If the Supreme Court of the United States will but deliberate upon its decision of February 28, 1921, in the light of the pleadings and contents of the record, its understanding will insure appreciation by it of the justice of the observation that it is the only court which has delivered an utterance in No. 495 that ascribes to the land department something that is in line with Edwards' reckless and malicious allegations

that "friendly relations with certain land department officials," "confidential letters to the individual examiners in charge of the cases," etc., etc., produced the issue of a patent to Bodkin for public lands rightfully belonging to Edwards.

Unless the Supreme Court of the United States was of opinion that Edwards' charges of malfeasance in office by officers of the land department were supported by the evidence adduced, it is not possible for there to exist any rational theory to account for said court's announcement that "the case as presented here turns essentially on questions of fact" and that the case was decided below upon proof of refusal or neglect on the part of the land department to consider "matters presented by Edwards which should have been considered."

SUPREME COURT OF CALIFORNIA DECLARES CASE TO BE ONE WHICH WAS DETERMINED ON QUESTIONS OF LAW EXCLUSIVELY.

There is very respectable evidence that the Supreme Court of the United States misconceived the true character of a case before it when it referred to Bodkin vs. Edwards, No. 495, as a case that "turns essentially on questions of fact," in that the Supreme Court of the State of California, having before it the opinion of the Court of Appeals, speaking through Circuit Judge Morrow, 249 Fed., 562, and the opinion of the District Court, speaking through Judge Trippet, 267 Fed., 1004, said of those opinions of the Federal courts in Edwards v. Bodkin that "it was there held that the Commissioner of the General Land Office HAD MISTAKEN THE LAW in declaring that the settler (Edwards) had abandoned his homestead

claim." (McLaren vs. Fleischer, and Culpepper vs. Ocheltree, 185 Pac., 967 and 971, respectively, decided December 1, 1919.)

The foregoing observation by the Supreme Court of the State of California will be found at page 25 of the Record in McLaren vs. Ocheltree, No. 291 in the Supreme Court of the United States, a case that has come into said court upon a writ of certiorari, which was obtained upon the representation that when the State court absolutely refused to follow the rulings in matters of law of the Federal courts in Edwards vs. Bodkin, there arose a "direct conflict" of opinion *upon matters of law exclusively* which the Supreme Court of the United States should settle.

OPPOSING COUNSEL ALSO PERCEIVES AND UNDERSTANDS THAT THE CASE IS ONE OF LAW AND *NOT* ONE OF FACT.

Opposing counsel in No. 495 is the same opposing counsel in Nos. 291 and 292, the latter being cases which have come into the Supreme Court of the United States upon certiorari to the Supreme Court of the State of California, because in said two cases the said State court expressed views on matters of law "in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards v. Bodkin, 249 Fed. Rep., 562, 568." (See the petition for certiorari in No. 291.)

Opposing counsel's brief in No. 291, copy of which was not served until April 16, 1921, contains the statement, at page 4 thereof, that in No. 291 "there is *necessarily* involved the question whether any valid contest can be initiated against any entry covering land included within such a withdrawal." (Italics supplied.)

In said brief, at said page thereof, appears the further statement:

> "The State courts have held in favor of such an authority in the Interior Department, but the Circuit Court of Appeals held directly to the contrary (Edwards v. Bodkin, 249 Fed., 562; 265 Fed., 621), *and the latter opinion has been affirmed by this Honorable Court in its decision rendered February 28, 1921, on a motion to dismiss or affirm (Bodkin v. Edwards, No. 495, October Term,* 1920)." Italics supplied.

FROM THE FOREGOING IT IS EVIDENT THAT OPPOSING COUNSEL AND OURSELVES ARE IN ENTIRE AGREEMENT AS TO ONE MATTER, AT LEAST, VIZ., THAT THE DECREE BELOW IN No. 495 WAS GRANTED SOLELY BECAUSE THE COURTS BELOW HAD HELD (1st) THAT CONTESTS AGAINST ENTRIES OF LANDS IN FIRST FORM RECLAMATION WITHDRAWALS WERE EXPRESSLY FORBIDDEN BY STATUTE, AND (2d) THAT ADMINISTRATIVE REGULATIONS THAT PERMITTED CONTESTS WERE INVALID.

Anyone who will read the matter at page 11 in opposing counsel's brief in No. 291 will cease to doubt the proposition that opposing counsel are of the opinion, an opinion shared by the bar and the public generally, that the Supreme Court of the United States, on February 28, 1921, *necessarily* approved, concurred in, sustained and gave plenary sanction to the ruling of the Court of Appeals, 249 Fed., 562, that the land department had "mistaken" or "overlooked" an act of Congress relating to the public domain, and had

done so for about fifteen years, and also, and for the same period, had enforced administrative regulations that contravened the law.

I.

District Judge Bledsoe in the District Court, sustained the motion to dismiss the *original* bill of complaint, 241 Fed., 931.

II.

The Court of Appeals, speaking through Circuit Judge Morrow, after saying that the land department had "mistaken" or "overlooked" a public land statute and that certain regulations of the said department were invalid, reversed Judge Bledsoe and directed that the order of dismissal be vacated, with leave to plaintiff to amend, if so advised, 249 Fed., 562.

III.

On and after the filing of the colorable amended complaint (District Judge Trippet remarking that there was no amendment that altered any material averment of the original bill, 267 Fed., 1004) defendant, *then realizing* (1st) *that Circuit Judge Morrow's rulings theretofore,* 249 Fed., 562, *in matters of law precluded the possibility of a denial of the prayers of the complaint in either the District Court or the Circuit Court of Appeals, and,* (2nd) *that therefore he was, necessarily, on the first leg of a journey to the Supreme Court of the United States on questions of law, filed an answer that imposed upon plaintiff the burden of proof of every allegation of the complaint that the Court of Appeals had theretofore adjudged was material.* THE

CASE WAS THEN SUBMITTED FOR DECISION BY THE DISTRICT COURT UPON AN AGREED STATEMENT OF FACTS AND SOME TESTIMONY FROM THE WITNESS CHAIR BY PLAINTIFF AND ANOTHER WHO TESTIFIED FOR HIM, WHICH TESTIMONY WAS PERMITTED TO GO IN OVER OBJECTION BY COUNSEL FOR BODKIN, WHO SAVED AN EXCEPTION. THEREAFTER SUCH TESTIMONY WAS ALLOWED TO STAND WITHOUT ANY ATTEMPT WHATSOEVER BY PLAINTIFF TO CONTROVERT OR REBUT IT (R., 65 to 70).

IV.

Judge Trippet found that those allegations of the bill, which had already been adjudged material by the Court of Appeals, excepting those allegations that charged government officers with bias, prejudice, fraud, etc., *were duly proved by the admitted facts and by the said unrebutted, and uncontroverted testimony, and, therefore, but necessarily following "the law of the case" as settled in the said prior Court of Appeals decision, signed a decree for the defendant.* 267 Fed., 1004.

It is vital that it be noted that Judge Trippett observed that "the plaintiff offered no proof regarding the misconduct of any of the officers in the land office."

That District Judge Trippet did not, *as the Supreme Court of the United States did,* rest a decision upon the wholly groundless statement that the evidence showed that the land department had failed to consider matters presented to it by Edwards, which it should have considered, is strikingly evident from the most conspicuous of all the real facts in the case, to

wit, that Judge Trippet, after finding, *on the admitted facts,* that Bodkin's affidavit of contest was executed on information and belief, and after stating *what the pleadings made one of the conceded facts,* viz., that Edwards remained upon the land from a date after initiation of Bodkin's contest until removed therefrom through legal processes invoked by Bodkin, expressly and unequivocally announced "We will, therefore, proceed to consider the case without regard to the rights of Bodkin, *for under the decision of the Court of Appeals, he had no rights to be considered.*" (Italics supplied.)

To impute to Judge Trippet's decision, *as the basis therefor,* a finding which he never made, viz., that the land department failed to consider matters presented to it by Edwards, which it should have considered, would be to misrepresent both that Judge and his decision.

V.

It was believed that to enter the Supreme Court of the United States thereafter, it was unavoidable that plaintiff should pass through the Court of Appeals. Accordingly he appealed to the latter Court, of course upon the record that had been made before Judge Trippet. Obviously, however, plaintiff could obtain no relief before the Court of Appeals, for the proof in the record was proof of such allegations in the bill of complaint, *excepting the allegations impeaching the integrity of government officers,* as the Court of Appeals had theretofore adjudged material and sufficient in law to entitle plaintiff to a decree. Inevitably, the Court of Appeals, speaking through District Judge Wolverton (265 Fed., 621), affirmed the decree which had been granted by District Judge Trippet.

Judge Wolverton exercised pains to make it unmistakably clear that his court's affirmance was, necessarily and unavoidably, an application to the case of the views of the Court of Appeals in matters of law which had been expressed theretofore by said court in 249 Fed., 562.

But Judge Wolverton did not dissent from Judge Trippet's finding that "the plaintiff offered no proof regarding the misconduct of any of the officers in the land office."

VI.

An appeal was duly taken to the Supreme Court of the United States. In the preparation of the record on such appeal, and only to save unnecessary expense to the appellant, who had been sued by appellee in *forma pauperis*, a considerable mass of patently irrelevant matter, which had not even been mentioned in any of the decisions theretofore rendered, and which, in the main, had gone into the record on the initiative of the alleged pauper, was very properly omitted. Some of such omitted matter was *all the evidence* adduced in the contest proceeding between Bodkin, contestant, and Edwards, contestee, in the land department, same having been the evidence which was the basis of that department's findings of fact in support of its action in cancelling Edwards' homestead entry. Neither the District Court, nor the Court of Appeals, had revised, modified or changed those findings of fact. *ON THE CONTRARY, THEY ACCEPTED THEM AS THEY WERE SET OUT IN THE COPIES OF THE SAID* DEPARTMENT'S DECISIONS AS PRINTED IN THE RECORD IN THE SUPREME COURT OF THE UNITED STATES. The other matter omitted was (1st), the copies of the three patents the land de-

partment had issued to Bodkin, the existence of which was alleged in the complaint and admitted in the answer, and (2nd), copies of the pleadings and of notes of proceedings in certain possessory actions between Bodkin and Edwards in the State Courts, which actions were brought after Bodkin had made a homestead entry of the land in suit, and in order to protect his possession against trespass by Edwards, which copies, of course, could not have been evidence, and were not deemed by either of the Courts below as evidence, of any fact of which the judiciary could take notice in determining whether in issuing patents to Bodkin, the land department had "mistaken" or "overlooked" the law, prejudicially to Edwards.

VII.

The entire evidence of every fact which either Court below had held was *proved*, THE WHOLE EVIDENCE OF ALL THE FACTS WHICH THE COURTS BELOW ADJUDGED WERE SUFFICIENT IN LAW TO REQUIRE A DECREE FOR EDWARDS, was carried into the record on which the case went to the Supreme Court of the United States.

Nothing more than that was required of Bodkin, the appellant, with respect to the record. His counsel had concluded that section 1 of rule 8 of practice in the Supreme Court of the United States required of him the elimination of all papers not necessary to the consideration of the questions to be reviewed.

Unless Arthurs *et al.* vs. Hart, 17 How., 5, 11, 12 and 15 is an unreliable guide in the preparation of a record in an *equity* case, Bodkin's counsel had not blundered. From the opinion in that case we quote the following:

"Two preliminary objections have been taken by the counsel for the defendant in error: 1. That, inasmuch as other evidence was given on the trial in the court below than that which has been brought on the record, or is found in the bill of exceptions, for aught that appears, the judgment may have been founded upon that evidence:

* * * * * * * * * *

"Evidence bearing exclusively upon questions of fact involved in the case, only incumber the record and embarrass the hearing in this court, as these questions are not the subject of review on error. *The mere fact, therefore, that other evidence was given on the trial besides that which is found in the bill of exceptions, furnishes no objection to an examination of the questions of law presented by it.*

"If that evidence bore upon these questions, and might influence our decision upon them, *the defendant in error should have brought it upon the record, or incorporated it in the bill of exceptions. His neglect to do so implies that it could properly have no such effect, if returned.*

* * * * * * * * * *

"And, in the return to the writ of error, so much of the evidence, *and no more, should be incorporated in the bill of exceptions, as was deemed necessary to present the points of law determined against the party bringing the writ.*" (Italics supplied.)

VIII.

The assignment of errors on the appeal to the Supreme of the United States, contained absolutely nothing which was even suggestive of a purpose to have that Court review rulings on the admissibility of evidence to prove a fact, in a case involving a Federal question. *Yet the Supreme Court's decision of February 28, 1921, contains the statement that "the case as presented here turns essentially on questions of fact."*

IX.

Such assignment of errors presented, exclusively, allegations that the Courts below had erred in their construction of acts of Congress and in their imputation of invalidity to certain Interior Department regulations.

X.

A motion to dismiss or affirm was filed in the Supreme Court of the United States. It was based upon two alleged grounds, each of which, accordingly as one appraises the legal attainments of the counsel that formulated it, was merely frivolity in said Court or a display of a lack of understanding of the law and of said Court's decisions. Because said motion was palpably lacking in merit, counsel for appellant in said Court ignored it, out of a desire to save his client further expense in his litigation with the alleged pauper.

This Court can not fairly hold counsel for Bodkin responsible for its misconception as to the character of the case. When any Court, after realizing that a motion to dismiss or affirm is without the remotest reference therein to a valid reason for sustaining it, prosecutes a search of the record for a ground upon which it can sustain such a motion, it takes upon itself the entire responsibility for any mistake it makes for granting the motion for a stated reason that has no basis in the actualities of things.

IT WOULD BE TREMENDOUS VIOLENCE TO JUSTICE FOR ANY COURT TO REFUSE TO CORRECT ONE OF ITS OWN ERRORS, COMMITTED WITHOUT CONTRIBUTION TO ITS COMMISSION FROM COUNSEL FOR THE PARTY WHO IS AF-

FECTED THEREBY, MERELY BECAUSE SUCH COUNSEL FAILED TO ANSWER A MOTION WHICH THE COURT, ITSELF, APPARENTLY ON FIRST READING, FULLY REALIZED WAS UTTERLY MERITLESS. OF COURSE THE SUPREME COURT OF THE UNITED STATES IS INCAPABLE OF WILLINGNESS TO INFLICT INJUSTICE.

XI.

Neither at the time of the filing of said motion, nor at any time thereafter, was any brief on the merits filed in the Supreme Court of the United States by either party to the cause.

The "settled rule" to which the Supreme Court of the United States refers in its decision of February 28, 1921, to wit, that concurring decisions below as to the facts will not be reviewed on the facts, unless clear error is shown, has come to have virtually the effect of statutory law. THEREFORE, IT IS RESPECTFULLY INSISTED THAT IT WOULD UNDOUBTEDLY BE BETTER CALCULATED TO INSURE AGAINST MISCONCEPTION AND ERROR IN SUCH A CASE AS SAID COURT DECIDED ON SAID DATE IF IT WERE THE PRACTICE TO POSTPONE CONSIDERATION OF THE ADVISABILITY OF APPLYING THAT "SETTLED RULE" UNDER A MOTION TO DISMISS OR AFFIRM WHICH WAS FRIVOLOUS IN ONE RESPECT AND DEVOID OF MERIT ALTOGETHER, UNTIL A BRIEF FROM ONE SIDE OR THE OTHER HAD BEEN FILED. IT SAVORS OF A SUMMARY JUDGMENT, OF A TRIAL WITHOUT A HEARING, FOR THIS COURT, AFTER AN APPELLANT HAS PAID A CONSIDERABLE SUM TO

PRINT HIS RECORD IN THIS COURT, TO AFFIRM DECISIONS BELOW IN THE CIRCUMSTANCES IN WHICH THIS COURT RENDERED AN AFFIRMANCE IN NO. 495 ON FEBRUARY 28, 1921.

XII.

FOR A STATED REASON WHICH WAS NOT EVEN REMOTELY HINTED AT IN SAID MOTION TO DISMISS OR AFFIRM, BEFORE THE APPELLANT HAD WRITTEN OR UTTERED A WORD IN DEFENSE OF HIS APPEAL, AND PROCEEDING UPON AN OBVIOUS MISCONCEPTION AS TO THE CHARACTER OF THE CASE, the Supreme Court of the United States, on February 28, 1921, overruled the motion to dismiss but sustained the motion to affirm, *rendering an unanimous opinion in support of its action*, which opinion is printed here in its entirety, to wit:

"SUPREME COURT OF THE UNITED STATES.

No. 495.—October Term, 1920.

Patrick H. Bodkin, *Appellant*,
vs.
William B. Edwards.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

(February 28, 1921.)

Mr. Justice Van Devanter delivered the opinion of the Court.

"This is a suit by Edwards to have Bodkin declared a trustee for him of the title to a quarter section of land in California. While the land was public and subject to entry under the homestead law, Edwards, a qualified applicant, made a homestead entry of it and afterwards submitted final proofs in due course. Bodkin instituted a contest against the entry and obtained its cancellation by the land department. The land officers then permitted Bodkin to make a homestead entry of the tract, afterwards allowed him to relinquish that entry and make others of the same tract under soldiers' additional rights of which he was the assignee, and finally patented the tract to him. During all these proceedings Edwards actively asserted the validity of his claim and sought to interpose it as an obstacle to passing the title to Bodkin. This suit was brought shortly after the patents issued. Apparently Edwards himself drafted the bill. The

District Court dismissed it without leave to amend and he appealed. The Circuit Court of Appeals, while recognizing that the bill was somewhat inartificial, held that it contained allegations which, if true, disclosed a right to the relief sought. The decree of dismissal was accordingly reversed. 249 Fed., 562. When the case got back to the District Court the form of the bill was helped by amendments, but the substance remained substantially as before. Bodkin answered and the issues were tried. The court found that the material allegations of the bill were true; that in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards. A decree for the latter followed and Bodkin appealed. The Circuit Court of Appeals affirmed this decree, and in the course of its opinion said: 'A careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated.' 265 Fed., 621. Bodkin then took a further appeal to this court, the decision of the Circuit Court of Appeals not being final under Sec. 128 of the Judicial Code.

"The appellee, Edwards, now moves that the appeal be dismissed, or in the alternative that the decree be affirmed, under Rule 6, 222 U. S., Appendix, p. 10. The appellant, Bodkin, although served with the motion and supporting brief, has not presented any brief in opposition.

"The motion to dismiss must be denied and the one to affirm sustained. The case as presented here turns essentially on questions of fact. Both courts below on a review of the evidence have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error is shown. Page v. Rogers, 211 U. S., 575, 577; Washington Securities Co. v. United States, 234 U. S., 76, 78; Wright-Blodgett

Co. v. United States, 236 U. S., 397, 402; National Bank of Athens v. Shackelford, 239 U. S., 81. No such error is shown by the record before us. Besides, it does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included. In these circumstances, to retain the case for oral argument in regular course would result in harmful delay and serve no useful purpose.

Decree affirmed.

A true copy.
Test: *Clerk Supreme Court, U. S.*"

SUPREME COURT MISCONCEIVES CASE TO BE ONE TURNING ON QUESTIONS OF FACT EXCLUSIVELY.

The decisive observation in the foregoing opinion is the single one that the two courts below found "that in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards."

There is not a syllable in Judge Trippet's decision, 267 Fed., 1004, that even tends to support the foregoing observation. That Judge rested his decision upon the effect in law, as the law had been expounded theretofore in 249 Fed., 562, of the admitted facts, the facts as stipulated by counsel (R., 30 to 65; 71 to 73). The admitted facts do not carry any matter that warrants said observation by the Supreme Court of the United States. Judge Trippet said that under the admitted facts he was required to hold, by reason of "the law of the case" doctrine, that, in contemplation of

law, there had been no contest by Bodkin against Edwards' entry.

There is in the Court of Appeals opinion, 265 Fed., 621, this statement, viz.:

> "A careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated, including the supposition of this court relative to use made of the soldiers' additional homestead scrip by Bodkin in securing his entry of the land in the land department."

Neither that statement, nor any other statement in said Court of Appeals decision, delivered by District Judge Wolverton, carries the implication that said Judge found that the land department had not considered matters which it should have considered. No one possesses such powers of divination as to know what Judge Wolverton really meant by his reference to "the supposition of this Court." He vouchsafed no clue whatever to the truly cryptic meaning of the reference.

Both Judge Trippet and Judge Wolverton had before them the precise matters of fact in proof which are set out in the record of the case in the Supreme Court of the United States. For anyone to say that Judge Wolverton had found that the land department had not considered matters it should have considered, would be to impute to Judge Wolverton a lack of knowledge of the contents of the record in the case he had decided. *In the record in his court, as in the record in the Supreme Court of the United States, it was shown by irrefragable proof, which even the redoubtable and maligning Edwards made no attempt to question, that the land department did consider, re-*

consider, review, re-review, hear and re-hear everything ever presented to it by Edwards, and everything which he alleged in his complaint he had presented to it. (Rec., 38 to 43; 50 to 54; 57 to 64; 71, 73.)

Exceedingly unfortunate and occasioning much bewilderment is the fact that in the Supreme Court decision of February 28, 1921, there is not the slightest attempt at specification or particularity as to the matters of fact or law the land department did not consider. FROM WHICH IT FOLLOWS THAT, UP TO THIS TIME, NEITHER BODKIN, NOR HIS COUNSEL, NOR ANYONE ELSE, KNOWS THE PRECISE DEFAULT IN A MATTER OF DUTY ON THE PART OF THE LAND DEPARTMENT WHICH THE HIGHEST TRIBUNAL IN THE JUDICIAL SYSTEM OF THE UNITED STATES HAS MADE THE BASIS FOR AN OPINION THAT EVENTUATES IN DECREEING OUT OF BODKIN AND INTO EDWARDS THE LEGAL TITLE TO A TRACT OF LAND WHICH THE UNITED STATES PATENTED TO THE FORMER.

Certainly the Supreme Court of the United States did not actually intend by its decision of February 28, 1921, to do what each of the courts below declared there was no proof or evidence whatever for doing, to-wit, ACTUALLY CONVICT OFFICIALS IN THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT OF MALFEASANCE AND MISFEASANCE IN OFFICE. But what other inference is a possible inference from the Supreme Court's observation in its said decision of February 28, 1921, viz., that "in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title

was passed to Bodkin when it should have gone to Edwards"?

Is not the foregoing quotation from the Supreme Court's decision quite in line with the allegations in Edwards' complaint that land department officials, and officials of the Department of Justice, had been biased and prejudiced against him, had conspired against him and had used "manufactured" evidence against him? THOSE ALLEGATIONS BY EDWARDS OF ACTUAL WRONG-DOING BY SAID OFFICIALS WERE THE ONLY ISSUABLE ALLEGATIONS OF FACT SET OUT IN HIS COMPLAINT UNDER WHICH IT WAS POSSIBLE FOR THE JUDICIARY TO HAVE FOUND THAT THE LAND DEPARTMENT HAD NOT CONSIDERED MATTERS WHICH IT SHOULD HAVE CONSIDERED. Those allegations were certainly not admitted to be true under Bodkin's answer. Furthermore, we submit that it is quite impossible for anyone to discover in the language of any of the decisions below anything of a nature likely to advise anyone of the fact, if it be a fact, that any of the courts below had found that the land department had refused to give consideration to matters presented to it by Edwards on his behalf.

IT IS RESPECTFULLY SUBMITTED THAT IT IS NOT IN THE POWER OF EVEN THIS AUGUST TRIBUNAL TO RE-CREATE THE DECISIONS BELOW, TO MAKE THEM DECISIONS THAT REST UPON THE DETERMINATION OF QUESTIONS OF FACT EXCLUSIVELY WHEN, UNMISTAKABLY AND OBVIOUSLY, THEY REST UPON THE DETERMINATION OF QUESTIONS OF LAW EXCLUSIVELY. NOR CAN EVEN THE GREAT EFFECT UPON THE PSY-

CHOLOGY OF THE BENCH AND BAR OF THE NATION OF THE OPINIONS OF THIS, THE WORLD'S GREATEST COURT, CAUSE THE BENCH AND BAR TO SEE, READ AND UNDERSTAND THE DECISIONS BELOW OTHERWISE THAN AS DECISIONS THAT ADJUDICATED A CONTROVERSY BETWEEN CITIZENS IN ACCORDANCE WITH THE VIEWS OF THE COURTS BELOW ON THE EFFECT IN LAW OF ADMITTED FACTS.

THE AUTHOR OF THIS PETITION HAS SUFFICIENT REASON FOR STATING THAT THE DEPARTMENT OF THE INTERIOR WILL CONTINUE TO REFUSE, AS IT HAS REFUSED IN THE PAST, WELLS v. FISHER, 47 L. D., 288, TO FOLLOW THE RULINGS IN MATTERS OF LAW WHICH WERE MADE IN THE DECISIONS OF THE FEDERAL COURTS BELOW AND WHICH THE SUPREME COURT OF THE UNITED STATES AFFIRMED ON FEBRUARY 28, 1921.

PUBLIC INTEREST, AS WELL AS PRIVATE RIGHT, REQUIRE THAT THIS PETITION BE GRANTED.

Within thirty days from February 28, 1921, and before mandate went down, a petition for rehearing under the decision of that date was filed. Such petition was denied, but not denied in an order announced from the bench. The only notice given to counsel for Bodkin of the denial was contained in a letter to him from the office of the court's clerk.

The cause of justice must be served at any cost.

Therefore we offer no apology to anyone for disclosing here the fact that after rendition of the Supreme Court decision of February 28, 1921, the Department of the Interior, realizing, as everyone familiar with public land matters must realize, that said decision will foment and encourage grossly unjust litigation attacking the security of numerous titles under numerous patents issued by the United States, made representations to the Department of Justice concerning said decision, and submitted to the judgment of the latter Department the propriety of filing in the Supreme Court of the United States a motion for leave to file a petition for rehearing *amicus curiae*.

The Department of Justice, FOR NO OTHER APPARENT OR STATED REASON than that it deemed it improper to defend the decisions and regulations of the land department that had been uniformly followed and enforced for fourteen years in a case between citizens in the Supreme Court of the United States, indicated that it felt constrained to refrain from filing such a motion. Co-ordinate departments of this government should be co-operative in the sole business of government, to wit, insurance of justice under the law to the citizen, to one of the owners of the government. No wrong to Edwards is possible from an act of the Department of Justice which is calculated to accomplish nothing more than to apprize the Supreme Court of the United States that, acting under a misapprehension as to the character of No. 495, it has affirmed a decree which is without any basis whatsoever therefor, except an inferior Federal court's patently erroneous conclusion (a conclusion which the land department has refused and will continue to refuse to abide), viz., that an act of Congress which,

in its express terms, specifically and exclusively relates to desert land entries was intended by Congress to relate to homestead entries also, and its further questionable conclusion that certain administrative regulations of the land department are in contravention of law.

When the Supreme Court of the United States has actually wronged both itself and a citizen, it is the sacred duty of that citizen's counsel to that Court as well as to his client, to point out specifically and unerringly the cause of the inadverent injustice to court and client.

THE MOST SERIOUS THING THE SUPREME COURT OF THE UNITED STATES HAS DONE IN THIS CASE IS, THAT BY ITS DECISION OF FEBRUARY 28, 1921, IT HAS FURNISHED ITS CRITICS, IF IT HAS ANY, WITH PROOF THAT IT HAD ENTIRELY MISCONCEIVED THE TRUE CHARACTER OF A CASE WHICH WAS PRESENTED TO IT UPON A RECORD WHICH CAN NOT TRUTHFULLY BE SAID TO CONCEAL OR EVEN DIM ITS TRUE CHARACTER.

And we venture further out of a sincere desire to avert just criticism of the Supreme Court of the United States, as well as the possibility of ascription to it of indifference to a bona fide, intelligent and maturely considered petition for rehearing, to say that from said Court's denial of our first petition for rehearing it might be inferred, by the uninformed, that the Court seemed to prefer to disregard its obvious misconception as to the character of the case rather than to correct that error.

The foregoing statement, as we very respectfully submit, fully justifies this second petition for rehearing. But, of course, it is fitting that we add, that our

respect for the Supreme Court of the United States, our unfeigned, genuine and profound respect for and confidence in it, the best of the institutions established by the possibly Divinely inspired men who founded a government designed to protect and effectuate the rights of man, must not be measured by the inference as to our attitude toward it which some men of more proficiency than ourselves in the power, or the art, of indirect expression of the same ideas might draw from our manner of statement of the case we present in this second petition for rehearing.

While our respect for this tribunal is boundless, we are without respect for or fear of misconception or error, regardless of its source. It is impossible for Lincoln's immortal words concerning the theory and principle of the government of the United States to have a basis in fact, it is grotesque hypocrisy to assert that the real spirit of the people of America was expressed in the recent shibboleth of battle that the world must be made safe for democracy, if there is not in the manhood of American citizenship the courage to insist that the Supreme Court of the United States avert an injustice to a citizen that results from a decision by it which was rendered under misconception and misapprehension.

PROFFERED SUPPLEMENTAL RECORD SHOWS THAT RECORD AS HERETOFORE PRINTED IN SUPREME COURT WAS A SUFFICIENT RECORD.

It is beyond the possibility of successful questioning that we serve hereby the Supreme Court of the United States, primarily, our client, secondarily, and lastly,

ourselves, for it might be inferred from this Court's observation in its opinion of February 28, 1921, viz., that the record "does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included," that through ignorance or futile design we had painstakingly sought to withhold from the Court's notice material matter hurtful to our client's case but helpful to the case of his adversary.

THAT THE SUPREME COURT OF THE UNITED STATES MAY BE ENABLED TO DETERMINE, (1st) WHETHER THERE EXISTS THE SLIGHTEST REASON FOR A SUPPOSITION THAT ANY MATTER OMITTED FROM THE RECORD IN No. 495 AS PRINTED IN THIS COURT WAS OMITTED THROUGH CULPABLE DESIGN ON THE PART OF COUNSEL FOR BODKIN, AND (2nd) WHETHER SUCH OMITTED MATTER POSSESSED MATERIALITY, WE HAVE, ON THE DATE OF THE FILING OF THIS SECOND PETITION FOR REHEARING, DELIVERED TO THE CLERK OF THE SAID COURT A "FULL TRUE AND CORRECT COPY," DULY CERTIFIED BY THE CLERK OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, OF EVERY WORD AND FIGURE IN THE RECORD OF BODKIN VS. EDWARDS, AS THAT RECORD WAS FILED AND PRINTED IN SAID COURT OF APPEALS, WHICH WAS OMITTED FROM THE TRANSCRIPT OF THE RECORD IN SAID CAUSE AS PRINTED IN THE SUPREME COURT OF THE UNITED STATES.

BODKIN AND HIS COUNSEL ARE READY

AND WILLING, ARE EAGERLY DESIROUS, TO HAVE PRINTED BY WAY OF A SUPPLEMENTAL RECORD, OR TO INCORPORATE INTO AN ENTIRELY NEW PRINTED RECORD IN THE SUPREME COURT OF THE UNITED STATES, THE ONE HUNDRED AND SIXTY-ONE (161) PAGES OF MATTER, THE MATTER OMITTED FROM THE PRINT OF THE RECORD IN THE SUPREME COURT OF THE UNITED STATES AND WHICH, CERTIFIED TO BY THE CLERK OF THE SAID COURT OF APPEALS, IS NOW IN THE CUSTODY OF THE CLERK OF SAID SUPREME COURT. IN OTHER WORDS, IF THE SUPREME COURT OF THE UNITED STATES WILL BUT EXERCISE ITS DISCRETION TO THE EXTENT OF RESTORING NO. 495 TO THE DOCKET FOR ARGUMENT, SUCH SUPPLEMENTAL RECORD, OR SUCH ENTIRELY NEW RECORD WILL BE PRINTED IN SAID COURT, ACCORDINGLY AS SAID COURT MAY DESIRE, NOTWITHSTANDING THE CONVICTION OF COUNSEL FOR BODKIN THAT THE OMITTED MATTER HAS EVER BEEN, ON ITS FACE, UTTERLY IMMATERIAL AND THEREFORE (ARTHURS, ET AL., V. HART, 17 HOWARD, 5, 11, 12, QUOTED FROM ELSEWHERE HEREIN), NEVER HAD A RIGHTFUL PLACE IN THE CASE OR IN ANY RECORD THEREOF.

WE NOW SUBMIT THAT WE HAVE DONE ALL AND EVERYTHING THAT HAS EVER BEEN WITHIN THE RANGE OF POSSIBILITY TO ENABLE THE SUPREME COURT OF THE UNITED STATES TO PERCEIVE THAT ITS DECISION OF FEBRUARY 28, 1921, PROCEEDED FROM A MISCONCEPTION OF THE CHARAC-

TER OF THE REAL AND ONLY ISSUES IN No. 495, AND THAT THERE NEVER EXISTED THE SLIGHTEST JUST CAUSE FOR THE IMPLIED CRITICISM OF COUNSEL FOR BODKIN (THAT HE SOUGHT TO KEEP MATERIAL MATTER OUT OF THE RECORD) WHICH IS CARRIED IN THE OBSERVATION OF SAID COURT THAT THE PRINTED RECORD IN SAID CAUSE "DOES NOT CONTAIN ALL THE EVIDENCE THAT WAS BEFORE THE COURTS BELOW, A PART HAVING BEEN OMITTED UNDER THE APPELLANT'S SPECIFICATION OF WHAT SHOULD BE INCLUDED."

CONCLUSION.

If the decision of the Supreme Court of the United States of February 28, 1921, in Bodkin v. Edwards, No. 495, October Term, 1920, is permitted to stand, despite the demonstration of its indefensible character which is made in this second petition for re-hearing, we shall be compelled to conclude that at least one of the unanimous opinions of that court did not mean what it implied, viz., that the intellect of every member of that tribunal had studied the record in the case and that the unanimous opinion therein faithfully reflected each intellect's conclusion thereon, for it is altogether impossible for us to believe that the majority of the minds of that bench would after thorough examination of the record in No. 495, entertain the belief that the courts below rested their decisions upon their concurrent findings "that in the proceedings before the land department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin

when it should have gone to Edwards," and that the record in No. 495, and the assignment of errors it carried justified the observation that "the case as presented here turns essentially on questions of fact."

PATRICK H. LOUGHRAN,
Mills Building,
Washington, D. C.,
Counsel for Petitioner and Appellant.

DISTRICT OF COLUMBIA, *ss:*

Patrick H. Loughran being first duly sworn deposes and says that he is counsel of record for the appellant and petitioner in No. 495, October Term, 1920, Supreme Court of the United States; that he drafted and filed the first petition for rehearing in said cause as well as the foregoing second petition for rehearing therein; that in so doing he has, as he sincerely believes, sought to serve more this Court than his client; that he knows No. 495 was decided in both Courts below on questions of law exclusively and that it was presented in the Supreme Court of the United States on questions of law exclusively; that he knows the said first petition and the foregoing second petition, to be entirely meritorious and that this Court should restore said cause No. 495 to the docket for argument.

PATRICK H. LOUGHRAN,
Mills Building,
Washington, D. C.,
Counsel for Petitioner and Appellant.

Subscribed and sworn to before me this 11th day of April, 1921.

[SEAL]

ADELAIDE SPRECKELMYER,
Notary Public.